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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States.

SANITARY REFRIGERATOR COMPANY,
Petitioner,
vs.
ALEXANDER F. WINTERS AND BASIL R. CRAMPTON,
Respondents.
No. 128. 4

ALEXANDER F. WINTERS AND BASIL R. CRAMPTON,
Petitioners,
vs.
DENT HARDWARE COMPANY,
Respondent.
No. ~~547~~. 14

MEMORANDUM FOR WINTERS & CRAMPTON.

FRANK E. LIVERANCE, JR.,
JOHN BOYLE, JR.,
Counsel for Winters and Crampton.

J. D. MILANS & SONS, 707 EIGHTH ST. N. W., WASHINGTON, D. C.

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} No. 547.

MEMORANDUM FOR WINTERS & CRAMPTON.

At the end of the presentation of the argument for Winters and Crampton in the above cases, to the Supreme Court on Friday, April 19th, it was suggested by the Chief Justice that a late statutory provision might have bearing upon the question of *res adjudicata* which was raised by the petitioners in Case No. 547 and permission was given by the Court to file a memorandum should any statutory provision be discovered which had any bearing on this matter.

The point of discussion was concerned largely with the matters of "final and conclusive" judgment and "final" decree, it being urged on behalf of the peti-

tioners in Case No. 547 that the Judgment of the Court of Appeals for the Seventh Circuit in Case No. 128 was final and conclusive as to the questions of validity and infringement of the patent notwithstanding that an accounting was ordered which would necessitate subsequent proceedings in the case.

It is believed that the statutory provision in the mind of the Court is that contained in Title 28, Section 227a, United States Code, reading as follows:

> "When in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is *final* except for the ordering of an accounting, an appeal may be taken from such decree to the Circuit Court of Appeals; provided, that such appeal be taken within thirty days from the entry of such decree or from the date of this act (section); and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal." (Italics ours.)

The title of this Act, which is of the date of February 28, 1927, was as follows:

> "An Act to amend Section 129 of the Judicial Code, allowing an appeal in a patent suit from a decree which is *final* except for the ordering of an accounting." (Italics ours.)

It appears from this section of the Statutes of the United States that the Congress considered the decree of the trial court in a patent suit, when questions of validity and infringement were to be determined, as final upon such matters, being of course completely final if the determination was that the patent was either invalid or not infringed, and "final except for

the accounting" if the determination was that the patent was valid and infringed; and necessarily when the appeal from any such decree to the Circuit Court of Appeals had been heard and decided, the order of judgment of such Circuit Court of Appeals on such questions of validity and infringement was necessarily final and also *conclusive* as to the validity and infringement of the patent.

The term "interlocutory" was not used in this Act of Congress directed solely to patent infringement suits. It is believed that, as a matter of proper inference if not direct statement, it was intended that a patent suit was to be considered, the first part thereof, as a determination which should be final and conclusive of the validity and infringement of the patent; and if the patent was held valid and infringed, then followed the second part of the suit, the accounting, proceedings under which did not and could not affect the previous final and conclusive determination of the questions of validity and infringement.

Very respectfully,

FRANK E. LIVERANCE, JR.,
JOHN BOYLE, JR.,
Counsel for Winters and Crampton.

Grand Rapids, Michigan,
April 23, 1929.